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National Abortion Rights Action League Amicus Brief for Webster v. Reproductive Health Services

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INTEREST OF *AMICI CURIAE*

Amici curiae share a common concern for the judicial protection of women's rights, including the constitutional right to reproductive autonomy. Because we believe that no ruling of this Court has had a more positive effect on the lives of American women than *Roe v. Wade*, we submit this brief to explain why this Court should maintain its protection of the right to choose abortion as defined in *Roe v. Wade*, 410 U.S. 113 (1973), through *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

The more specific interests of each of the seventy-five *amici curiae* are set forth in Appendix A.[1]

SUMMARY OF ARGUMENT

Although the constitutional protection of reproductive autonomy is cast in doctrinal terms of the liberty-based right of privacy, the scope of such protection must be informed by an awareness of its implications for women's equality as well.[2] Abortion restrictions that force pregnant women to bear children do more than render empty the constitutional promise of liberty for women by profoundly structuring their lives. They do so for women alone; men are not required to endure comparable burdens in the service of the state's abstract interest in promoting life. To ensure that the constitutional guarantee of liberty "extends to women as well as to men," this Court must secure women's right to choose abortion lest it "protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Thornburgh*, 476 U.S. at 772.

Freely chosen and planned childbearing is often a joyous experience. But because "few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision . . . whether to end her pregnancy," *id.*, forced motherhood threatens the core of a woman's constitutionally valued autonomy in two distinct ways.

First, state interference with abortion violates the principle of bodily integrity that underlies much of the Fourteenth Amendment's promise of liberty. The process of bearing a child involves the most intimate and strenuous exercises of the female body and psyche; compelling a woman to devote her body, mind and soul to continue an unwanted pregnancy constitutes an invasion of our deepest sense of privacy and the primacy of self-determination. Forced continued pregnancy also entails a more tangible violation of physical liberty by subjecting women to a host of physical burdens and risks that range from prolonged discomfort and pain during pregnancy and delivery, to a substantial risk of specific medical complications, and even to death. State abortion restrictions thus require women — and women only — to endure physical intrusions and risks that are greater than those previously found by this Court to violate the constitutional principle of bodily integrity.

Second, state interference with abortion denies women the capacity to control their own lives in the most basic of ways. The bearing and raising of children often places severe constraints on women's employment opportunities and therefore threatens their ability to support themselves and their families. Moreover, teenagers' inability to postpone motherhood until they have completed a basic education and are psychologically and financially equipped properly to care for children largely predetermines the paths their lives will take before they have even developed their own identities and aspirations. Hence, the imposition of abortion restrictions both belies the constitutional promise of personal autonomy and curtails women's ability to participate equally with men in the public world.

Bald assertions of an unabridged state interest in protecting the potentiality of human life, proclaimed to be sufficiently "compelling" to justify these major invasions of all aspects of women's personal autonomy, must be viewed by this Court with great skepticism. There is no logical stopping point at which such an asserted interest can be cabined. Thus, this Court's cognizance of this interest as "compelling" would not only result in the unprecedented evisceration of a fundamental right; it would also provide states with an open-ended invitation to impose a wide range of other liberty-curtailing policies on pregnant women, dictating their employment, health care, diet, exercise, and even leisure activities.

Moreover, that a state chooses to advance its interest in potential life by restricting women's reproductive autonomy, thereby resurrecting archaic stereotypes about women's proper role in society, counsels further against recognition of that interest as "compelling." States never impose comparable physical burdens or risks on men in requiring them to protect other persons; by singling out only women to sacrifice their bodies and autonomy to protect the mere potentiality of life, abortion restrictions both reflect and reinforce the stereotype that breeding children is women's "natural role." This Court cannot safely cede control over the availability of abortion to a political process that can be expected to undervalue both the importance to women of this aspect of their fundamental liberty and the burdens and risks of forced motherhood. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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* This *amicus curiae* brief has not been edited by THE YALE JOURNAL OF LAW AND LIBERATION.

1. *Amici curiae* file this brief with the consent of all parties and letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

2. Significantly, the Court decided *Roe v. Wade* in the same Term in which it condemned "our Nation['s] . . . long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality), and began protecting women from state legislation that would limit women's opportunities to the role of homemaker and mother. *See* Karst, Book Review, 89 Harv. L. Rev. 1028, 1036 (1976) ("Not merely the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in our society.").

ARGUMENT

I. RESTRICTIVE ABORTION LAWS INTERFERE WITH WOMEN'S CONSTITUTIONAL RIGHT TO LIBERTY BY RESTRICTING THEIR ABILITY TO MAKE FUNDAMENTAL DECISIONS ABOUT THEIR BODIES AND LIVES.

The liberty-based right to privacy includes the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Indeed, control of one's own reproductive capacities is a prerequisite to the exercise of many of the other fundamental choices that are protected from government interference by the Fourteenth Amendment's liberty guarantee, choices by which people determine their participation in the public world, define their personal lives and structure their families.[3] Thus, the decision whether or not to bear a child lies, for women, "at the very heart" of the fundamental right to liberty. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).[4]

At some time in their lives, most women willingly choose to bear and raise children. For many of them, having a wanted child is a joyful and enriching experience. Yet bearing and raising children also imposes significant physical risks and societal burdens on women, which not all women can assume at all times and in all circumstances. The constitutional guarantee of liberty protects the right of women to assess those risks and burdens, and to decide if and when they are prepared to assume them.

State restrictions on abortion therefore violate women's fundamental right to liberty in at least two different ways.[5] First, they infringe on a woman's right to bodily integrity by imposing on her tremendous physical intrusions and significant physical risks and pain. This Court has held that less invasive and dangerous government-imposed bodily intrusions violate the constitutional guarantee of liberty. Second, because the birth of a child significantly circumscribes a woman's life choices, state restrictions on abortion infringe on the fundamental "freedom of choice in the basic decisions of . . . life" protected by the Fourteenth Amendment. *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring) (emphasis omitted).[6]

A. Restrictive Abortion Laws Subject Women to Substantial Physical Intrusions and Risks In Violation of Their Fundamental Right To Bodily Integrity.

A woman's body must adjust dramatically to provide nourishment and space for a developing fetus.[7] During pregnancy, her uterus changes from pear-shaped to nearly spherical and, by the end of pregnancy, has increased to 500 to 1000 times its original capacity. As her uterus enlarges, it displaces and compresses other bodily organs including her heart, appendix and gastrointestinal tract. The woman's resting pulse rate increases by ten to fifteen beats per minute,

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3. This Court has held that the Fourteenth Amendment guards not only those rights enumerated by the Constitution but also "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)). The Court has long protected the liberty to decide when or whether to marry, *see Loving v. Virginia*, 388 U.S. 1 (1967), how to raise and educate children, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923), and when or whether to conceive or bear children, *see Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

4. A woman's liberty interest in making her own decision concerning whether she will bear a child does not diminish after conception occurs. Indeed, as Justice Stevens points out, "if one decision is more 'fundamental' to the individual's freedom than the other, surely it is the postconception decision that is the more serious." *Thornburgh*, 476 U.S. at 776 (Stevens, J., concurring).

5. The Solicitor General argues that the proper constitutional inquiry is whether a woman has been afforded a "meaningful opportunity" to avoid an unwanted pregnancy, taking into account such options as abstinence and contraception. Brief for the United States as *Amicus Curiae* Supporting Appellants, at 22 n.16. Not only is this proposed inquiry inconsistent with Supreme Court precedent, but its factual premise that women who become pregnant have in some sense consented to the pregnancy belies reality. Abstinence during the forty years a woman is fertile is not a viable way of life for most women, and sterilization, while effective, requires women permanently to sacrifice rather than exercise their "interest in procreative choice." *Id.* Moreover, no other method of contraception is 100% effective, and many present significant health risks that make them inappropriate for many women. Finally, the large number of women, especially teenagers, who never receive proper information about contraception cannot be said to have a meaningful opportunity to avoid pregnancy. These women and others who are the inevitable losers in the contraceptive lottery no more "consent" to pregnancy than pedestrians "consent" to being struck by drunk drivers.

Indeed, underlying the Solicitor General's position appears to be the outmoded view that women ought not engage in sexual intercourse for reasons other than procreation and that those who do — unlike their male partners — deserve to be punished with an unplanned pregnancy.

6. This Court has held that laws that interfere with women's right to choose abortion or any other fundamental right must be strictly scrutinized and cannot stand absent a compelling state interest. See, *e.g.*, *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983). *See generally San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (strict scrutiny required if law has " 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty").

Justice O'Connor has proposed that strict scrutiny be applied in the abortion context only to laws that "unduly burden" women's abortion decisions. *Akron*, 462 U.S. at 461-65 (O'Connor, J., dissenting). But unless the undue burden standard is intended to apply to *all* fundamental rights (which would drastically rewrite this Court's fundamental rights jurisprudence), its application would impermissibly single out for weaker protection the one fundamental right unique to women.

7. J. Pritchard, P. MacDonald & N. Gant, Williams Obstetrics 181-205, 218, 260-63 (17th ed. 1985) [hereinafter *Williams Obstetrics*].

and her heart may increase slightly in size. A woman's average total weight gain during pregnancy is about 25 pounds.[8]

Although the extent of the physical burdens associated with pregnancy and childbirth varies from woman to woman and the joy of having a wanted child can positively influence the way a woman experiences those physical changes, most women experience pain and significant discomfort. Even the healthiest of women may experience nausea, intermittent vomiting, increased frequency of urination, fatigue, back pain, difficulty sleeping, labored breathing and water retention.[9]

Women also risk many serious, albeit less common, medical complications, including toxemia of pregnancy or preeclampsia (combination of high blood pressure, water retention and protein in urine), eclampsia (preeclampsia plus convulsions potentially leading to coma), gestational diabetes (glucose intolerance during pregnancy), thromboembolic disease (vascular inflammation and blood clots potentially leading to fatal pulmonary embolism), and cardiomyopathy (enlargement of the heart resulting in congestive heart failure).[10]

Labor and delivery, during which a woman's body must meet extraordinary physical demands, pose additional risks. Women usually experience extreme pain during labor and the process of vaginal delivery, which in most cases lasts for six to twelve hours and in some cases longer.[11] Vaginal delivery also entails substantial risk of infection and laceration.[12] The dangers are magnified in the approximately one in four deliveries that are accomplished by cesarean section, including risks from general anesthesia, infection and blood clots.[13] Pregnancy-related death also remains a distinct possibility, even for healthy women. Death can result from hemorrhage, hypertension, infection, or other complications from cesarean deliveries.[14]

The dangers normally faced are compounded for women in "high risk" groups. Medical conditions such as systemic lupus erythematosus, multiple sclerosis, asthma, diabetes and AIDS can be exacerbated by the physical changes attending pregnancy.[15] These risks are even greater for older or very young women.[16] The stress of carrying an unwanted pregnancy exacerbates some of the physical consequences of pregnancy, including high blood pressure and asthma, thereby increasing the woman's risk of serious physical consequence beyond that normally faced.[17]

This Court's protection of the right to choose abortion is based in part on its recognition of the serious physical risks attending pregnancy: "[t]he detriment that the State would impose upon the pregnant woman by denying this choice [whether to have an abortion] altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved." *Roe*, 410 U.S. at 153. Indeed, the trimester approach developed in *Roe* reflected the fact that a first trimester abortion was safer than continued pregnancy. *See Roe*, 410 U.S. at 163.[18]

Legal abortion remains far safer than childbirth. In terms of mortality, "abortion through the 15th week of pregnancy is at least tenfold safer than childbearing." Cates, Smith, Rochat & Grimes, *Mortality From Abortion and Childbirth, Are the Statistics Biased?* 248 J.A.M.A. 192, 196 (1982). "Moreover, the risk of death from legal induced abortion is no higher at any point in gestation than is the risk of childbearing." C. Tietze & S. Henshaw, *Induced Abortion: A World Review* 110 (1986). Similarly, the non-fatal health risks associated with legal abortion are very limited and substantially lower than those risks, described above, created by continued pregnancy and delivery.[19]

Because after conception has occurred, continued pregnancy entails both a protracted bodily invasion and significantly greater burdens and risks than abortion, a state's decision to prevent women from choosing abortion is an unprecedented affront to the constitutional principle of bodily integrity. Indeed, because this principle is so deeply and historically embedded in our common law[20] as well as our constitutional traditions, it is not surprising that government has

8. *Id.* at 182, 188, 194, 197.

9. *Id.* at 181-210, 218, 260-63.

10. *Id.* at 526-30, 600, 731. The recommended treatment for some of the serious complications is complete bed rest until delivery. *Id.* at 750-51. Some pregnancy-related medical problems such as hemorrhoids and varicose veins (which can cause severe discomfort and swelling, requiring surgery) can persist beyond delivery. *Id.* at 261-62.

11. D. Danforth, M. Hughey & A. Wagner, *The Complete Guide to Pregnancy* 228-31 (1983).

12. S. Romney, M.J. Gray, A.B. Little, J. Merrill, E.J. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* 626-27, 632, 637 (2d ed. 1981) [hereinafter *Gynecology and Obstetrics*].

13. L. Silver & S. Wolfe, *Unnecessary Cesarean Sections: How to Cure a National Epidemic* 9, 13 (1989).

14. See *Williams Obstetrics*, *supra* note 7, at 3. In 1986, 270 women died during childbirth in the United States. Delivery by cesarean section increases approximately four-fold the risk of death in childbirth. L. Silver & S. Wolfe, *supra* note 13, at 12.

15. See *Williams Obstetrics*, *supra* note 7, at 597, 600, 609, 619-20; Winton, *Skin Diseases Aggravated by Pregnancy*, 20 J. Am. Academy of Dermatology 1, 7 (Jan. 1989). Medications that normally control pre-existing conditions often pose risks to fetal development, requiring women either to accept those risks or to sacrifice their own health. *See Williams Obstetrics*, *supra*, at 260.

16. See, *e.g.*, *Williams Obstetrics*, *supra* note 7, at 3, 539; Alan Guttmacher Inst., *Teenage Pregnancy: The Problem That Hasn't Gone Away* 29 (1981).

17. See *Gynecology and Obstetrics*, *supra* note 12, at 726. Knowledge of fetal anomaly or of a disease, such as AIDS, that may be passed on to the fetus, also greatly increases stress during pregnancy.

18. *Roe* also relied on the fact that most women faced with an unwanted pregnancy experience a significant improvement in mental health and outlook after an abortion. *Roe v. Wade*, 410 U.S. at 153. *See* Brief of *Amicus Curiae* American Psychological Association in Support of Appellees (noting that studies of mental health of pregnant women before and after abortion reveal significant reductions in symptoms of stress after abortion and discussing methodological problems in research relied on by *amici curiae* supporting Appellants).

19. *Williams Obstetrics*, *supra* note 7, at 483-88. By contrast, prior to *Roe*, illegal abortions performed by back-alley abortionists led to the deaths of at least hundreds and perhaps thousands of women each year, and countless other women suffered serious, often permanent, injuries, including sterility. *See* R. Schwarz, *Septic Abortion* 7 (1968); Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (1982); *see also Williams Obstetrics*, *supra*, at 484 ("Serious complications of abortion have been most often . . . associated with criminal abortion.").

20. See discussion *infra* at 7.

rarely attempted to impose analogous intrusions in other contexts.[21] But the principles underlying this Court's infrequent treatment of state-mandated intrusions in such contexts demonstrate that forced childbearing visits unacceptable violations upon women's bodily integrity.

For example, in *Winston v. Lee*, 470 U.S. 753 (1985), the Court held that, in part because of "the extent of [its] intrusion upon the individual's dignitary interest in personal privacy and bodily integrity," *id.* at 761, a state could not, consistent with the Fourth Amendment, compel a criminal defendant to submit to an invasive surgical operation in order to retrieve a bullet necessary for the state's prosecution. By comparison, a state-mandated continued pregnancy more profoundly violates a woman's "dignitary interest in personal privacy." She is constantly aware for nine months that her body is not wholly her own; the state has conscripted her body for its own ends.[22]

Moreover, the Court in *Winston* also found that the criminal defendant's right to bodily integrity would be violated by the state's imposition of the risks inherent in a surgical procedure consisting of a small incision in his skin and retrieval of the bullet. By comparison, one in four pregnant women delivers by cesarean section, which requires a much larger incision in the woman's abdomen, and is accompanied by all the risks, pain and permanent disfigurement associated with invasive surgery. Similarly, in *Rochin v. California*, 342 U.S. 165 (1952), this Court overturned a conviction obtained from a "shocking" bodily invasion consisting of forced stomach pumping of a criminal suspect. The pain and discomfort associated with having one's stomach pumped is comparable to the physical effects of pregnancy, including morning sickness, which is experienced by many pregnant women on a recurring basis, and the compression of bodily organs that results from the enlargement of the uterus. Given that these isolated aspects of pregnancy involve risks and burdens comparable to those found unacceptable when imposed upon criminal defendants, the entire pregnancy and childbirth experience certainly constitutes an intolerable bodily intrusion when imposed by the state on pregnant women.

In sum, the physical burdens imposed by the compelled continuation of pregnancy amount to a significant invasion of women's bodily integrity.[23] As Chief Justice Rehnquist has recognized, women "suffer disproportionately the profound physical, emotional, and psychological consequences" of pregnancy. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 471 (1981). For women to maintain bodily integrity, as men do, they must not be subject to state coercion forcing them to carry their every pregnancy to term.

B. Restrictive Abortion Laws Deprive Women Of The Freedom To Control The Course Of Their Lives And Restrict Their Ability To Participate In Society Equally With Men.

Few events can more dramatically constrain a woman's opportunities in life than an unplanned child. Because under present social conditions, most women assume primary responsibility for raising their children,[24] having an unwanted child would limit their ability fully to participate in public life. Moreover, for the many women unable to shoulder the numerous burdens accompanying childrearing, forced motherhood would relegate them (certainly for long periods and perhaps permanently) to a daily struggle to make ends meet; any hopes of fulfilling their own plans and dreams would be shattered. Denying women's ability to control when and whether to bear children, thereby denying women their capacity to define their paths through life in the most basic of ways, would contravene the principle of personal autonomy underlying the Fourteenth Amendment's liberty guarantee.[25]

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21. Indeed, the few contexts in which states have attempted such intrusions on bodily integrity have generally involved criminal defendants, over whom states traditionally exercise a great deal of authority, and courts have generally invalidated such attempts. Pregnant women's bodily integrity and liberty are entitled to at least as much constitutional protection.

22. By contrast, a woman desiring to carry her pregnancy to term perceives the growing fetus as a welcome presence within her body rather than an invasion of her privacy. Cf. *Winston*, 470 U.S. at 753 ("When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved. . . . [But where the state] proposes to take control of respondent's body [t]his kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.").

23. While a woman might choose to bear children gladly and voluntarily, statutes that curtail her abortion choice are disturbingly suggestive of involuntary servitude, prohibited by the Thirteenth Amendment, in that forced pregnancy requires a woman to provide continuous physical service to the fetus in order to further the state's asserted interest. Indeed, the actual process of delivery demands work of the most intense and physical kind: labor of 12 or more grueling hours of contractions is not uncommon. Cf. *United States v. Kozminski*, 108 S. Ct. 2751 (1988) (criminal involuntary servitude is present where compulsion of services is achieved by use of physical or legal coercion).

24. Fuchs, *Women's Quest for Economic Equality*, 3 J. Econ. Persps. 25, 25 (1989). Although women could release their infants for adoption, the vast majority do not relinquish them, generally because doing so is exceedingly traumatic. *See, e.g.*, Winkler & Van Keppel, *Relinquishing Mothers in Adoption: Their Long-Term Adjustment*, Monograph No. 3, Institute of Family Studies (1984).

25. Among the fundamental rights protected by the Fourteenth Amendment is the "interest in independence in making certain kinds of important decisions." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, No. 87-1379, slip op. at 12 (U.S. Mar. 22, 1989) (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977). As Charles Fried has recognized:

> "What a person is, what he wants, the determination of his life plan, of his concept of the good, are the most intimate expressions of self-determination, and by asserting a person's responsibility for the results of this self-determination we give substance to the concept of liberty." C. Fried, *Right and Wrong* 146-47 (1978). *See also* Fried, *Correspondence*, 6 Phil. & Pub. Aff. 288-89 (1977) (the concept of privacy embodies the "moral fact that a person belongs to himself and not others or to society as a whole").

Thornburgh, 476 U.S. at 777 n.5 (Stevens, J., concurring).

Forced motherhood would particularly limit life's options for teenagers who become pregnant, even before they have the opportunity to define their own identities and aspirations or prepare for the weighty responsibilities of motherhood. Childbearing presently curtails many teenagers' ability to obtain even the most basic education: eight out of ten who currently become mothers at age seventeen or younger do not complete high school, and four of ten who have a child by the age of fifteen do not finish even eighth grade.[26] Early motherhood also constrains teenagers' ability to earn a decent income. In part because of their limited educational experience, teenage mothers receive lower hourly wages and earn less annually for the rest of their lives than women who postpone childbearing.[27] These teenage mothers earn about half as much income as those who first give birth in their twenties, and sixty-seven percent of families headed by teenage mothers live below the poverty level.[28]

Even for many women who become pregnant after their teens, opportunities in the public world are severely constrained. Many women lose their employment during pregnancy because employers unlawfully discriminate against them or do not adapt their jobs either to perceived fetal hazards[29] or to the perceived physical constraints of pregnancy;[30] many other women lose their jobs or suffer significant financial hardships because employers do not provide or do not pay for job-protected leave for childbearing or infant care.[31] Over the long term, because today's workplace generally does not accommodate the responsibilities of those caring for young children, and because day care often is inadequate, unavailable, or unaffordable, many mothers (especially those who are young, unmarried, minority, or lower income) must leave their jobs in order to care for their children.[32] Others must either accept part-time work with significantly less pay and few if any job benefits[33] or move to less skilled positions so that they can work a regular schedule.[34] Even those remaining in their original jobs often cannot advance because their child care responsibilities conflict with job requirements as presently defined.[35]

As a result, childbearing imposes severe financial constraints on women,[36] many of whom depend on their income to support themselves. Indeed, 60% of women in the labor force are either single (25%), divorced (12%), widowed (4%), separated (4%), or have husbands whose earnings were less than $15,000 (15%).[37] Many of these women even now do not make ends meet; already, women maintain 51% of families below the poverty level, including 75% of poor black families, 49% of poor Hispanic families, and 42% of poor white families.[38] Childbearing and rearing thus have the potential to limit women's life options in the most basic of ways. If this Court were to overrule *Roe*, thereby depriving women of the right to control the frequency and timing of their pregnancies, it would deny women the ability to plan and shape their futures and assume their place in the public world.[39] Some of those who suffer will be teenagers for whom

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26. Fielding, *Adolescent Pregnancy Revisited*, 299 Mass. Dep't Pub. Health 893, 894 (1978). Moreover, less than two percent of teenage mothers complete college, compared to more than one-fifth of those women who do not bear children until age 24. Center for Population Options, *The Facts: Teenage Childbearing, Education, and Employment* 1 (1987).

27. This comparison holds true even when factors such as socioeconomic status are taken into account. *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* (Vol. I) 130 (C. Hayes ed. 1987).

28. Center for Population Options, *supra* note 26, at 1 (figures for families with children aged five or younger).

29. Courts have upheld exclusionary policies in the workplace, even though they appear to violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1982). See, *e.g.*, *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

30. See, *e.g.*, *Harriss v. Pan Am World Airways*, 649 F.2d 670 (9th Cir. 1980).

31. See *Family and Medical Leave Act of 1988* 18-25, H.R. Rep. No. 511, H. Comm. on Educ. and Labor, 100th Cong., 2d Sess. (1988); R. Spalter-Roth & H. Hartmann, *Unnecessary Losses: Costs to Americans of the Lack of Family and Medical Leave* 5 (1988).

32. See *Women's Work, Men's Work: Sex Segregation on the Job* 73-74 (B. Reskin & H. Hartmann eds. 1986) [hereinafter *Women's Work*]. Job structures do not inevitably fail to accommodate childrearing responsibilities. Rather, societal allocation of resources, in concert with established employment practices, operate to disadvantage individuals raising children.

33. See Blau & Ferber, *Women in the Labor Market: The Last Twenty Years*, in 1 *Women and Work: An Annual Review* 19, 28 (L. Larwood, A. Stromberg & B. Gutek eds. 1985); O'Neill, *Role Differentiation and the Gender Gap in Wage Rates* in 1 *Women and Work: An Annual Review* 50, 57.

34. *Women's Work*, *supra* note 32, at 74.

35. *Id.*

36. Compared to childless women, mothers earn considerably less per hour and their wages drop sharply with each additional child. Fuchs, *supra* note 24, at 35. For example, of white women between the ages of 30 and 39 who worked more than 1,000 paid hours in 1986, those with 3 children earned 70 cents to every dollar earned by women with no children. *Id.* No similar relation between children and hourly earnings exists for men who become fathers. *Id.*

37. Women's Bureau, Office of the Secretary, U.S. Dep't of Labor, Leaflet No. 88-2, 20 *Facts on Women Workers* 2 (1988) (based on March 1987 statistics).

38. *Id.* at 4; *see also* I. Garfinkel & S. McLanahan, *Single Mothers and Their Children: A New American Dilemma* 12-15 (1986).

39. Because *Roe v. Wade* has afforded women greater control over the timing of their childbearing, women have been able to plan for and minimize somewhat the accompanying burdens. In part as a result, women as a class have experienced significant economic gains over the past sixteen years, gains that would be jeopardized were the Court to deprive women of the right to chose abortion. In fact, since *Roe*, women's labor force representation has increased significantly, and the occupations in which they work have become significantly less sexually segregated. *Women's Work*, *supra* note 32, at 23-24.

Moreover, the wage gap between women and men has diminished. Economist Victor Fuchs demonstrates that the group most responsible for the decrease in the wage gap between women and men that occurred between 1980-1986 was composed of women born between 1946 and 1950 who were in their late thirties in 1986. A key difference between these women and those born half a decade before is that they had substantially fewer children, Fuchs, *supra* note 24, at 36-37, and more control over the timing of the children they did bear.

many of life's options will be foreclosed before they have finished growing up. Some will be single mothers, whether widowed, divorced, or never married, who are struggling to feed and care for the children they already have. Some will be older women, married or single, who have already raised a family. Denied the ability to control their reproductive capacity, the Fourteenth Amendment's promise of liberty is rendered hollow for women.[40]

II. THE STATE'S BALD ASSERTION OF A "COMPELLING" INTEREST IN PROTECTING POTENTIAL LIFE DOES NOT JUSTIFY A RETREAT FROM *ROE*.

A. A Critique Of Viability Does Not Absolve This Court Of Its Responsibility To Accommodate Women's Fundamental Right To Reproductive Autonomy.

According to this Court, the state has an "important and legitimate interest in protecting the potentiality of human life."[41] For any given pregnancy, however, promoting this interest by prohibiting abortion necessarily deprives a pregnant woman of her fundamental right to decide whether and when to bear a child. The Court in *Roe* concluded that the state's interest becomes sufficiently compelling to override a woman's right only after the point of fetal viability, and even then only in cases in which the woman's health is not endangered by continued pregnancy.

Both Missouri and the Solicitor General now ask this Court to relabel the state's interest in protecting potential life as compelling prior to viability so as to override a woman's right at all times. This extraordinary request is based solely on the assertion that viability provides an unworkable dividing line. Current medical evidence reveals that this critique is unfounded.[42] But even were the critique acceptable, the conclusion that the state's interest is always compelling would not logically follow; the unworkability of viability as a dividing line would equally support the opposite conclusion that the state's interest in protecting potential life is *never* sufficiently compelling to outweigh a woman's fundamental right to choose abortion. Hence, the critique of viability merely begs the central question of how to evaluate the state's asserted interest in the context of abortion restrictions.

Where giving effect to a state interest — even one asserted to be "compelling" in the abstract — entails interference with the exercise of a fundamental right, such as the right to choose abortion, this Court struggles to protect the right and closely scrutinizes the context and manner in which the interest is asserted. The Court has carefully evaluated, for example, whether the state's proposed infringement on the right is narrowly tailored to promoting the asserted interest,[43] whether the manner in which the state pursues the interest may reflect or perpetuate stereotypes,[44] and whether the interest outweighs in importance the protection of a particular right in a particular context.[45] These inquiries reflect a consistent judgment that even extremely weighty interests do not easily justify interference with fundamental rights;[46] therefore, this Court must examine closely Missouri's assertion of an interest in potential life sufficiently compelling to prohibit abortion from the moment of conception.

While Missouri relies on its flawed critique of the viability distinction, several of Missouri's *amici curiae* suggest that support for the existence of a broad compelling interest in potential life lies in various states' recognition of the fetus as a legal person under property, tort and criminal law. This argument is unpersuasive. Without question, states possess sufficiently important interests to justify such recognition of the fetus in certain limited contexts. For example, granting a cause of action for prenatal injuries resulting from the tortious conduct of others compensates the subsequently born child and his or her parents for the injuries, and also deters such tortious acts.[47] These and similar measures properly promote the interests and well-being of the child, while at the same time promoting the interests of the pregnant woman. But acceptance of such measures provides no guidance for the treatment of the very different clash of asserted state interest and fundamental right involved in the abortion context.

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40. Overruling Roe would also severely constrain the lives, not only of women who become pregnant, but of all women. If women no longer had the right to choose abortion, all women capable of bearing children would have to attempt to plan their lives knowing that, as long as contraceptive devices fail, their lives might be interrupted at any time by an unwanted pregnancy.

41. *Roe*, 410 U.S. at 162.

42. See, *e.g.*, Brief of Neurobiologists and Neonatologists as *Amicus Curiae* Supporting Appellees.

43. See, *e.g.*, *Eu v. San Francisco County Democratic Cent. Comm.*, 57 U.S.L.W. 4251, 4253 (U.S. Feb. 21, 1989); *see also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (states must "adopt the least drastic means to achieve their ends").

44. See, *e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

45. See, *e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' *at least in the context of higher education*, to support the use of racial considerations in furthering that interest.")(emphasis added).

46. Thus, for example, the Court has recognized that, although "as a general proposition" the government "has a vital national interest" in protecting foreign diplomats in accordance with international law, that interest is not "automatically . . . compelling" when its assertion infringes upon First Amendment rights. *Boos v. Barry*, 108 S. Ct. 1157, 1165 (1988); *see also Coy v. Iowa*, 108 S. Ct. 2798, 2802 (1988) (defendant's Sixth Amendment rights "outweighed" state's interest in "protecting victims of sexual abuse"); *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) (Court cannot "distort Constitution to approve all that the [state] may deem expedient" and in the national interest when fundamental rights are at stake).

47. Similarly, penalizing third parties for causing a woman's pregnancy to terminate without her consent, either through civil wrongful death actions or criminal "feticide" laws, protects pregnant women from serious physical harm, severe bodily intrusion, and the termination of wanted pregnancies.

B. Recognition Of A Compelling State Interest In Protecting Potential Life Throughout Pregnancy Would Both Completely Eviscerate Women's Right To Choose Abortion And Portend Even Broader Invasions Of Women's Fundamental Rights.

This Court has never accepted such a broad interest as compelling so as to eliminate virtually all constitutional protection afforded a fundamental right. Were this Court to accept Missouri's blanket contention that its interest in potential life outweighs women's fundamental right to procreative autonomy at all stages of pregnancy, states would be free to criminalize abortion in virtually all circumstances,[48] to investigate all abortions to determine whether they were spontaneous or intentionally induced,[49] and then to prosecute for murder women who intentionally ended their pregnancies.[50] In analogous circumstances where a state proffered an interest which, if deemed compelling, would have had "no logical stopping point" and would have completely overridden a particular constitutional right, this Court has refused to recognize the interest as compelling. *See, e.g., City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706, 723 (1989) (interest in redressing generalized societal discrimination deemed not to be sufficiently compelling to justify race-conscious remedies because it "has no logical stopping point") (citation omitted); *id.* at 723 (interest in providing role models deemed not to be sufficiently compelling to justify race-conscious remedies because it "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration").[51]

Indeed, recognition of a broad "compelling" interest in protecting potential life necessarily would legitimize many other state intrusions on procreative autonomy that would be "essentially limitless in scope and duration."[52] Missouri's reasoning would allow states to criminalize the use of any contraceptive devices, such as intrauterine devices and the Pill, that prevent implantation of a fertilized ovum after conception. More fundamentally, since the "potentiality" of life exists equally before sperm-ovum fusion as after, states could invoke the same "compelling" interest proffered here to justify laws prohibiting the use or sale of *all* contraceptives. At bottom, embracing the position advocated by Missouri would not only require the reversal of *Roe*, but would also call into question *Griswold* and *Eisenstadt* as well.[53]

Moreover, embracing Missouri's position would also provide states with an open-ended invitation to force pregnant women to act in whatever ways the state determined were optimal for the fetus, thereby reducing pregnant women to no more than fetal containers. A frightening preview of the potential intrusions is found in Mo. Rev. Stat. 1.205 itself (part of which is at issue here), which states that "[t]he life of each human being begins at conception" and "[u]nborn children have protectable interests in life, health and well-being." A Missouri court relied on section 1.205 in ordering a pregnant woman to submit to a cesarean section against her wishes, finding that "the life, health and well-being" of her fetus "may be jeopardized" by her decision. *Deaconess Hosp. v. McRoberts*, No. 874-00172 (St. Louis Cir. Ct. May 21, 1987).

Within a month of this Missouri case, a District of Columbia court granted a hospital's similar request for an order compelling a woman who was critically ill with cancer to undergo a cesarean section, despite the unanimous objections of the woman, her family and her physicians and despite the uncontroverted fact that it might hasten the woman's death. *See In re A.C.*, 533 A.2d 611 (D.C. 1987), *vacated & reh'g en banc granted*, 539 A.2d 203 (D.C. 1988). The fetus was not viable and did not survive; the woman herself died two days later. The District of Columbia Court of Appeals, which had refused to stay the order, issued an opinion subsequent to the woman's death in which it stated "we well know that we may have shortened [her] life span" but concluded that the value of her remaining life was outweighed by the "slim" chance that the fetus might survive. 533 A.2d at 613-14, 617.[54]

Although cases citing protection of fetal interests to justify other types of infringements upon pregnant women's autonomy have been relatively rare — largely because of *Roe* — a handful of such cases have arisen in the last decade. Courts have jailed pregnant women based on a belief that the women might act contrary to the interests of the fetuses

48. Accepting Missouri's recharacterization would allow states to criminalize abortions even when a woman's pregnancy is the result of rape or incest, and when childbearing poses a serious risk to the woman's health or life. Cf. *Roe v. Wade*, 410 U.S. 113, 118 (Texas criminal statute proscribed all abortions except those necessary to protect life of pregnant woman).

49. Approximately 31% of all pregnancies terminate by spontaneous abortion prior to the third trimester. Wilcox, Weinberg, O'Connor, Baird, Schlatterer, Canfield, Armstrong & Nisula, *Incidence of Early Loss of Pregnancy*, 319 New Eng. J. Med. 189 (1988).

50. Moreover, complete strangers could have free reign to intervene in the lives of women and their families. This troubling scenario was actually played out in the recent case of *In re Klein*, No. 1736-89 (N.Y. App. Div. Feb. 8, 1989). There, a man requested guardianship of his comatose, pregnant wife for the purpose of authorizing an abortion he believed could improve her chances of recovery. Two anti-abortion activists who had never even met the Klein family sought to intervene and prevent the abortion. Relying in part on *Roe*, a New York appellate court ruled that "these absolute strangers to the Klein family, whatever their motivation, have no place in the midst of this family tragedy." *Slip op.* at 4.

51. *See also Cohen v. California*, 413 U.S. 15, 25 (1971) (interest in preserving public order deemed not to be sufficiently weighty to justify restrictions on free expression because it is "inherently boundless").

52. *Croson*, 109 S. Ct. at 723.

53. To be sure, the probability that any given act of sexual intercourse will lead to the birth of a child is less than 100%. But the probability that any given embryo will lead to a live birth is itself only approximately 69%. See *supra* note 49. In any case, some potential for life still exists even prior to conception, and if a state attempted to protect that life by proscribing the use of contraceptives, this Court would be hard-pressed to justify a constitutional ruling that the state's interest in postconception potential life is compelling but its interest in preconception potential life is not.

54. Courts in at least 11 states have ordered women to submit to cesarean sections. See Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 New Eng. J. Med. 1192 (1987) (also citing six cases in which courts refused to order such surgery).

they carried.[55] A woman was prosecuted and faced imprisonment for allegedly waiting "many hours" before seeking medical help after she noticed some vaginal bleeding and experienced some uterine contractions.[56] In another case, a child was allowed to sue his mother to recover for prenatal injuries allegedly caused by the woman's failure to act as a "reasonable" pregnant woman.[57]

If this Court accepts a compelling state interest in the fetus from conception, laws like section 1.205 could be used to force women to submit not only to cesarean sections, but also to other types of surgery and medical treatment deemed to be in the interest of the fetuses they carry, including *in utero* fetal surgery. Pregnant women could be denied medical care needed to protect their own health, such as radiation or chemotherapy to treat cancer or the use of prescription or nonprescription drugs. A wide range of common conditions and conduct arguably posing some threat to fetal health could provoke state intervention, criminal prosecution or civil liability, including: being overweight, being underweight, exercising, not exercising, failing to eat "well," failing to "stay off of her feet," smoking, drinking alcohol, ingesting caffeine, and suffering physical harm due to negligence.

In short, acceptance of Missouri's assertion of a broad compelling interest in protecting potential life would do far more than eviscerate the fundamental right to abortion, already an unprecedented step at odds with the Court's consistent effort to balance state interests with individual rights. It would also provide the constitutional foundation for a frontal assault on other fundamental liberties.

C. The Imposition of Unparalleled Burdens Only On Women To Service The State's Asserted Interest In Potential Life Impermissibly Reflects and Reinforces Outmoded Stereotypes Of Women As Childbearers.

Missouri's decision to advance its interest through pre-viability abortion restrictions must also be rejected because it entails the resurrection of "archaic and overbroad generalizations" about women's proper role in society. *Califano v. Webster*, 430 U.S. 313, 317 (1977) (per curiam). States have long sought to restrict women's autonomy and opportunities for participation in public life, citing women's ability to bear children as the principal justification for this unequal and disadvantageous treatment. For example, states excluded women from certain professions,[58] limited the hours women could work outside the home,[59] and discouraged women's involvement in political and civic affairs.[60]

For many years this Court accepted such detrimental treatment as the "natural" consequence of women's reproductive capacities and as furthering important state interests, such as "preserv[ing] the strength and vigor of the race." *Muller v. Oregon*, 208 U.S. 412, 421 (1908). This Court has now soundly rejected the outmoded view that "the female [is] destined solely for the home and the rearing of the family," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), and it has invalidated legislation that perpetuates women's image as the " 'weaker sex' or . . . child rearers." *Califano*, 430 U.S. at 317. Despite the likely absence of malicious intentions and the widespread acceptance (even among women) of unequal treatment, the Court has recognized that the Constitution prohibits the state from disadvantaging any individual woman on the basis of stereotypes.[61]

The Court has therefore refused to accept asserted state interests that reflect "traditional . . . assumptions about the proper roles of men and women." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). In *Hogan* itself, the Court precluded Mississippi from operating a women-only nursing school, rejecting the state's asserted interest in increasing educational opportunities for women because the state's action gave "credibility to the old view that women, not men, should become nurses . . . ." *Id.* at 730.

Abortion restrictions reflect and reinforce the same stereotypes of women that this Court has found illegitimate. By requiring women to sacrifice their bodies and their liberty in ways that the state never demands of men, states manifest

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55. A District of Columbia court recently ordered the incarceration of a woman solely to prevent her from using cocaine during the remainder of her pregnancy. See *United States v. Vaughn*, 117 Daily Wash. L. Rep. 441 (D.C. Super. Ct. Mar. 7, 1989). The woman had pled guilty to the misdemeanor of second degree theft (for check forgery); the prosecutor recommended that the woman not be jailed and the judge stated that he would have accepted the recommendation but for the fact that the woman was pregnant and tested positive for cocaine use. In fact, the judge indicated that he might even jail a pregnant woman to prevent her from ingesting alcohol or smoking cigarettes. *Id.* at 442.

See also In re Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (reversing juvenile court's order that women with alleged mental illness be institutionalized during last two months of pregnancy; appellate decision came only after woman had given birth and been released).

56. The woman's pregnancy was complicated by a dangerous condition, placenta previa, which caused her to hemorrhage and lose a great deal of blood. Her son was born with severe brain damage and died within six weeks. The woman was prosecuted for causing her son's death through her own loss of blood. See *People v. Stewart*, No. M508197 (San Diego Mun. Ct. Feb. 27, 1987) (transcript of decision); Defendant's Memorandum of Points and Authorities in Support of Demurrer to Complaint Without Leave to Amend and in Support of Motion to Dismiss, *People v. Stewart*.

57. *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W.2d 869 (1981). *But see Stallman v. Younquist*, 125 Ill. 2d 267, 531 N.E.2d 355, 359 (1988) (court refused to recognize cause of action for prenatal injuries in suit filed by girl against her mother, noting that otherwise "[m]other and child would be legal adversaries from the moment of conception until birth").

58. See, *e.g.*, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872) (women excluded from practice of law).

59. See, *e.g.*, *Muller v. Oregon*, 208 U.S. 412 (1908).

60. See, *e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961) (women exempted from jury duty), *overruled*, *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Breedlove v. Suttles*, 302 U.S. 277 (1937) (women exempted from paying poll tax if they "chose" not to vote).

61. See, *e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality) ("[O]ur Nation has had a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

the stereotype that it is women's "natural role" to bear children. The fact that the state's interest in depriving women of control over their own reproductive capacities can be cloaked in noble terms does not diminish the actual harm and invasion of liberty suffered by individual women denied abortion. And the fact that many people (including women) presently are not troubled by this stereotype is no more constitutionally relevant today than was the popularity of "romantic paternalism" many years ago. Just as previous state limitations on women's ability to participate in public life presumed that the "paramount destiny and mission of women are to fulfil[l] the noble and benign offices of wife and mother," *Bradwell*, 83 U.S. at 141, laws that deprive women of their ability to choose whether to end a pregnancy force women to fulfill that same destiny.

Moreover, reinforcing this stereotype by upholding restrictive abortion laws would lead states once again to restrict women's autonomy in the name of enforcing their "motherly duties" in the non-abortion contexts discussed above.[62] The Court held in 1908 that states could limit the hours women worked outside the home because work was thought harmful to reproductive capacity: "[working long hours has] injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." *Muller*, 208 U.S. at 421. We risk repeating and even worsening this "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality), by allowing states, in the name of fetal protection, to control women's decisions and actions regarding employment, medical treatment, exercise, diet and overall lifestyle.[63]

Although Missouri asserts an interest in compelling unwilling women to sacrifice their bodies, health and well-being for nine months to protect *potential* life, Missouri and other states never impose comparable duties on men to protect *actual* life. The value that our law attaches to the individual right to liberty is so great that people are generally not required to reach out to aid another person, even when it is possible to save another from grave injury or certain death at little or no risk to one's self.[64] Particularly instructive is *McFall v. Shimp*, in which the court refused to order a man to donate bone marrow, a procedure far less risky and painful than many aspects of pregnancy and childbirth, even though the donation was necessary to save the life of his cousin. According to the court:

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save that human being or to rescue . . . . For our law to *compel* the Defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, . . . and one could not imagine where the line would be drawn.

10 Pa. D. & C. 3d 90 (Allegheny Cty. 1978) (*per curiam*).[65]

To permit the state's interest in potential life to prevail over women's fundamental rights would have the perverse

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62. See discussion *supra* at 10.

63. Many of the *amici curiae* supporting Appellants reveal that their willingness to impose unprecedented burdens on women through forced childbearing stems from their own stereotyped views of women. Some *amici curiae* portray women as incapable of moral decisionmaking. *See, e.g.*, Brief of Covenant House and Good Counsel, Inc., *Amici Curiae* 9-10, 17 (discussing wide variety of behavior of pregnant women that could harm fetus, from smoking to obtaining inadequate prenatal care, and concluding that state must protect potential life from conception "[i]f *any* children are to have reasonable assurances of healthy birth and productive life"). Others describe women as the victims of their own abortion decisions. *See, e.g.*, Brief *Amici Curiae* of Focus on the Family, and Family Research Council of America, in Support of Appellants 13-24 (purporting to describe adverse medical and psychological risks of abortion, as well as "serious sexual problems experienced by women who had abortions"). Virtually all trivialize or deny entirely the tremendous harms to women's liberty, equality and health inflicted by state restrictions on abortion. *See, e.g.*, Brief of the United States Catholic Conference as *Amicus Curiae* in Support of Appellants 15-19 (downplaying medical risks of pregnancy and denying existence of pre-*Roe* maternal mortality and morbidity due to illegal abortion).

64. W. Keeton, D. Dobbs, R. Keeton & D. Owen, The Law of Torts § 56, at 375-76 (5th ed. 1984); *Restatement (Second) of the Law of Torts* § 314 (1965); Uniform Anatomical Gift Act 2(b),(c) (19xx) (organ donations unlawful if made against wishes of decedent).

A small number of states require people to stop at the scene of or report an accident. These requirements do not, however, present passersby with any risk of physical harm. For example, the Minnesota Good Samaritan statute specifies that assistance is never required if providing it poses a "danger or peril to self or others." Minn. Stat. § 604.05 Subdiv. 1 (1988). Nor does the law ever require a father to put himself at appreciable physical risk to help his child. Professor Tribe notes that "the law nowhere forces *men* to devote their bodies and restructure their lives even in those tragic situations (such as organ transplants) where nothing less will permit their children to survive." L. Tribe, *American Constitutional Law* 1354 (2d ed. 1988); *see also* Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569, 1588 (1979) ("[C]onsider a simple burning building, with a child trapped inside. Would a court impose criminal liability on anyone, even the child's parent, who did not attempt to save the child at the risk of second-degree burns over one or two percent of his or her body? . . . [E]ven if the potential rescuer is specified to be the child's parent, liability is unlikely. In all other cases, the suggested imposition is unthinkable in the context of our legal system.").

65. *See also In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180, 182 (1975) (rejecting family's attempt to force incompetent schizophrenic man to donate kidney to sister because of "the absence of real consent on his part," even where dire need of transfer was established).

In addition, the medical risks to which Missouri would subject unconsenting pregnant women starkly contrast with the right of consent afforded all others. Ordinarily when a person faces serious medical risks that might result from recommended surgery, the choice lies with that individual whether to accept those risks and consent to the procedure. At common law it was recognized that "a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), *overruled on other grounds, Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

effect of elevating fetuses to "superhuman" status by giving fetuses protections that states do not give to persons. This provides further evidence that this legislative "trade-off" rests upon an illegitimate stereotype that women are essentially, and "naturally," childbearers, and that women are therefore appropriate targets for a subordination of bodily freedom and autonomy that never has been and never would be placed in comparable fashion upon others in society. Just as the right of a potential donor or rescuer to refuse to help is fully protected by the common law's respect for bodily freedom, so too must the law respect the right of a woman to choose whether to undergo the great burdens of pregnancy and childbirth.

* * * * *

This Court is asked to view the state's interest in protecting potential life as so compelling that it eviscerates women's fundamental right to reproductive choice throughout pregnancy. The Court has never before found a purported state interest to be compelling in a context where that interest would justify intrusions with "no logical stopping point" on a fundamental right.[66] The Court in *Roe* understood and discharged its responsibility to protect fundamental rights from undue government interference by allowing women's right and the state's interest to supersede each other at different temporal stages of pregnancy. Retreating today from this commitment to the safeguarding of fundamental rights would cede complete control over women's (and only women's) reproductive autonomy (and hence a core aspect of their social, economic and political freedom) to a political process that frequently has failed to treat women fairly; particularly given the highly charged emotional environment in which legislative "balances" necessarily would be struck, legislatures can be expected again to undervalue both the importance of protecting women's autonomy and the burdens of state-imposed continued pregnancy and childbirth. Allowing state legislatures to dictate women's most intimate and fundamental decisions in life would fail utterly to respect the Constitution as an operative restraint on unwarranted legislative intrusions on fundamental liberties and would fail to discharge this Court's duty to be the "ultimate guardian" of those liberties.

CONCLUSION

To ensure that the constitutional guarantee of liberty "extends to women as well as to men," *Thornburgh*, 476 U.S. at 772, this Court must reaffirm *Roe v. Wade* and prohibit states from forcing women to continue pregnancies through laws such as the Missouri provisions at issue in this case.

Respectfully submitted,

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66. *Croson*, 109 S. Ct. at 723. Even if the Court found the asserted interest in protecting potential life "compelling," abortion restrictions would still fail heightened scrutiny because they are not the least restrictive means of promoting this interest. For example, the Surgeon General of the United States' recent report on abortion concludes that governments could curtail the incidence of abortion through various non-coercive means, such as implementing sex education programs and subsidizing the costs of childbearing and rearing for women bearing unplanned children. *See* Surgeon General's Report on Abortion, *reprinted in* 135 Cong. Rec. E906, E909 (daily ed. March 21, 1989).